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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFERSON WILLIAM THAMES,

Defendant and Appellant.

C063737

(Super. Ct. No. CM028969)

After a trial to the court, defendant Jefferson William Thames was found guilty of sodomy with a child under 10 years old, failure to register as a sex offender, and committing a lewd act upon a child under 14 years old. The court further found he had a prior conviction under the three strikes law. (Pen. Code, §§ 667, 1170.12.) After denying defendant's *Romero*¹ motion to strike the prior conviction, the court sentenced defendant to an aggregate term of 67 years and 4 months to life in prison.

¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

On appeal, defendant's sole contention is that the trial court abused its discretion in denying his *Romero* motion because "he fell outside the spirit of the three strikes laws." We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Count I

Sodomy With A Child Under The Age Of 10 Years

Between the end of 2007 and July 2008, defendant babysat Rhiannon M.'s five children in her home at least three or four times a week. In exchange, he received "gas, cigarettes" and "stuff that he needed." Rhiannon had known defendant for approximately six or seven years as her boyfriend's friend.

On or about July 26, 2008, Rhiannon overheard her six-year-old daughter talking to some of her siblings about "putting stuff in the anus." Rhiannon questioned her about the statement and she responded "that [defendant] was messing around with her, so touching her butt and stuff like that." Rhiannon called her boyfriend and they reported the allegation to the sheriff's department.

The next day, a nurse practitioner at UC Davis Medical Center performed a physical exam on the child. She told the nurse practitioner that her "butt" "hurt when she was with [defendant]," and the examination revealed a fairly significant laceration in her rectum. The nurse practitioner found the results abnormal and suspected sexual abuse. A peer review confirmed her findings. The California Department of Justice

crime lab found defendant's DNA in the sperm on the child's underwear, which was collected during the examination.

At trial, the child testified defendant repeatedly put his penis in her "booty" after placing a blanket, towel or pillow over her head, hurting her each time he did so.

Count II

Failure To Register By Filing A Change Of Address

Defendant was required to register as a sex offender after his conviction for assault with intent to commit rape in 1996. His last registered address as of June 9, 2008, was on Roseben Avenue in Oroville. On July 25, 2008, defendant admitted to a detective that he had not lived at the Roseben address "for quite some time" and that he had been living on B Street with his girlfriend. At trial, a witness testified defendant had lived on B Street since February 2008.

Count III

Lewd Acts Upon A Child Under The Age Of 14 Years

In 2006, defendant lived with Michael K. and his four children because the family "needed a[n] in-home baby-sitter." At that time, defendant had been a family friend for about six years. In December 2008, after hearing inappropriate stories, Michael K. removed defendant's picture from their family collage. Michael's son "got kind of awkward" and "distanced" when he saw defendant's picture. He then told his father about an inappropriate incident with defendant. At trial, the child testified defendant put his penis inside his "butt-crack" and moved it twice. He asked defendant to stop because it hurt and

he did. The incident occurred while defendant babysat the four-year-old child.

Prior Criminal History

On August 28, 1996, defendant was convicted of assault with intent to rape his girlfriend. The court initially granted probation. In March 1998, after he violated his probation, the court sentenced defendant to four years in prison. Between 2000 and 2001, defendant violated his parole twice. The court returned him to custody for each violation. Between defendant's release in 2001 and his arrest on the present charges, he did not have any new misdemeanor or felony convictions.

THE TRIAL

Defendant waived his right to a jury trial. The trial court found him guilty on all three counts and found he had a prior conviction.² Prior to sentencing, the 33-year-old defendant requested that the trial court dismiss the 1996 conviction as a prior strike under the three strikes law because his record "consist[ed] of only one prior felony conviction" and he was facing "significant custodial time" without consideration of the prior strike. At the sentencing hearing, the court stated it had reviewed defendant's request and asked to hear from counsel. In support of his motion, defendant argued his "strike [wa]s his only prior felony conviction" and his record

² The 1996 conviction is a "prior conviction of a felony" under the three strikes law. (See Pen. Code, §§ 667.5, subd. (c)(15), 1192.7, subd. (c)(10).)

was "somewhat minimal in nature." The prosecutor requested that the court deny the request "based on [defendant's] ongoing criminal lifestyle that is obviously more acute and aggravated." The court denied the *Romero* motion and proceeded with sentencing.

The court imposed consecutive sentences based on defendant's independent, separate acts against separate victims, and doubled the terms for each offense in accordance with the three strikes law. The court sentenced defendant to 25 years to life for the sodomy (doubled to 50 years to life), the upper term of 8 years for the lewd act (doubled to 16 years), and one-third of the middle term (8 months) for the failure to register (doubled to 1 year and 4 months).

The court found the factors in aggravation outweighed those in mitigation. In aggravation, the court cited the following factors: "a pattern of increasingly serious criminal conduct," "violation on probation, as well as two parole violations," and he "took advantage of a position of trust." The court stated that "if he [were] not imprisoned, he w[ould] continue to perpetrate violent sexual offenses and be a danger to others." The court found no factors in mitigation.

DISCUSSION

Defendant contends the trial court abused its discretion in denying his *Romero* motion. We disagree.

A trial court has the discretion to strike a prior serious felony conviction for purposes of sentencing only if the defendant falls outside the spirit of the three strikes law.

(Pen. Code, § 1385; *People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 529-530.) In deciding whether to do so, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, at p. 161.) The court's discretion is limited by the concept of "furtherance of justice," requiring the court to consider both the defendant's constitutional rights and the interests of society. (*Romero*, at p. 530.)

The trial court's "failure to . . . strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) In reviewing for abuse of discretion, we are "guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citations.] Second, a "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized

nor warranted in substituting its judgment for the judgment of the trial judge.'"" [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.)

Defendant argues he is "not the type of career criminal for whom the three strikes laws were adopted." He contends the court should have granted his *Romero* motion because: (1) "he had only one prior felony conviction from over ten years earlier"; (2) "he had originally been granted probation on that conviction, so it was not considered serious by the sentencing court"; (3) "he had remained out of custody and free of conviction for over seven years prior to his arrest on the present charges"; and (4) he "was going to receive a substantial sentence on the present convictions even if the prior strike conviction was dismissed." We are not persuaded.

Although a prior conviction's age and sentence may be relevant in weighing the nature and circumstances of that conviction, neither negates the sexual nature of the offense itself. (See Pen. Code, § 667, subds. (c)(3), (d)(1).) At most, each is but one factor for the court's evaluation. That a court may focus only on particular factors in ruling on a request to strike does not establish that it ignored others in the absence of affirmative evidence to that effect. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

Here, the trial court considered the nature and circumstances of the prior and current offenses, concluding

"defendant's record indicates a pattern of increasingly serious criminal conduct." Defendant's prior conviction of assault with intent to rape provides insight into defendant's escalation and sophistication in his current offenses. The past and present offenses were sexual exploitations of victims who held defendant in a position of trust, first as a boyfriend and then as a family friend and babysitter. Further, defendant's record shows an increased sophistication in the selection of his victims. In the prior conviction, defendant sought to exploit his girlfriend, an adult. In the current offenses, defendant chose his very young minor victims from among their three or four siblings, after knowing each family for over six years. The nature of the prior offense in relation to the present offenses supports the trial court's findings.

Further, while some courts have dismissed prior strikes as remote in time, the current felony offenses in those cases were minor. (See *In re Saldana* (1997) 57 Cal.App.4th 620, 623-624, 626-627 [current felony conviction for possession of .88 grams of heroin; prior strike conviction 16 years old]; *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1247-1249, 1251 [current felony conviction for petty theft; prior strike convictions 17 to 20 years old].) In contrast, here the current offenses were sexual acts upon very young minors. "It is not enough to show that reasonable people might disagree about whether to strike one or more . . . prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit

of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers, supra*, 69 Cal.App.4th at p. 310; see *People v. Cluff* (2001) 87 Cal.App.4th 991, 994, 1004 [failure to strike prior conviction might be abuse of discretion only if present offense is a technical violation].) Thus, only in "an extraordinary case" where "no reasonable minds could differ" would the failure to strike be an abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) This is not such a case.

Defendant also contends he falls outside the spirit of the three strikes law because he remained free of custody and conviction for seven years prior to the current charges. In response, the People accurately point out that defendant in fact remained crime free for no more than five years following his release from prison.

Although the trial court did not expressly address this contention, the court discussed various factors regarding defendant's character, background, and prospects. Such factors include defendant's repeated, independent, separate sexual acts against separate victims, his taking advantage of positions of trust and confidence, and his performance on probation and parole. Defendant's probation and parole violations and his recidivism are strong indications of his unwillingness to comply with the law.

Lastly, defendant contends dismissing the prior strike would avoid imposition of an unjust sentence, "which is an appropriate reason to dismiss prior strike convictions."

Defendant is correct that his sentence is an overarching consideration when deciding a *Romero* motion "because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences." (*People v. Garcia* (1999) 20 Cal.4th 490, 500.) However, the three strikes law "creates a *strong presumption* that any sentence that conforms to the sentencing norms is both rational and proper." (*People v. Carmony, supra*, 33 Cal.4th at p. 378, italics added.) This presumption will be rebutted only if defendant meets his burden of showing the sentencing decision was irrational or arbitrary. (*Id.* at pp. 376-377.)

The record shows the trial court rationally and methodically imposed defendant's sentence. The court discussed the factors in aggravation, including the violation of trust, the probation and parole violations, the pattern of serious criminal conduct, and defendant's recidivist nature prior to sentencing. The court found no factors in mitigation. Only after considering the terms for each offense did the court impose the enhancement under the three strikes law.

"Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling." (*People v. Myers, supra*, 69 Cal.App.4th at p. 310.) The trial court carefully weighed the applicable factors under *Romero* and concluded defendant fell within the spirit of the three strikes law because his "record indicates a pattern of increasingly serious criminal conduct." The trial

court's determination was neither irrational nor arbitrary.
Accordingly, we find no abuse of discretion.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.